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In the Supreme Court of the United States

OCTOBER TERM, 1983

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

—vs.—

NATION ENTERPRISES and
THE NATION ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR VOLUNTEER LAWYERS FOR THE ARTS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION INC.

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Volunteer Lawyers for the Arts, Inc. ("VLA") submits this brief amicus curiae in support of petitioners, Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. All parties to this suit have given written consent to the filing of this brief amicus curiae.

INTEREST OF THE AMICUS

VLA is a nonprofit organization that provides, and arranges for, free legal services to artists and non-profit arts organizations otherwise unable to afford such services.[1]

VLA's clients include individual creators such as authors, dramatists, composers, lyricists, choreographers, painters, visual artists, and photographers. These clients create copyrighted works and sell the rights of first publication of their works.

In addition, VLA's clients, whatever their field, are working artists whose livelihoods depend not only on their ability to sell the rights of first publication of their works, but also on their reputations and integrity as artists.

The Court of Appeals majority, in an unprecedented decision, ruled below that a commercial magazine which knowingly received a purloined *unpublished* copyrighted work could nevertheless substantially appropriate and publish that work, without the author's consent, under the guise of "*fair* use."

We believe that use was blatantly *unfair*. If the holding below stands, VLA's clients, and every other creator, would be at serious risk. A creator's right of first publication of his work would be seriously jeopardized. That right is not merely of economic value. An artist's reputation and integrity depend in part on his control over whether, and under what circumstances, he will make his work public. The publication of an

[1] VLA is licensed to practice law in the State of New York. It has a roster of almost 800 volunteer attorneys who provide free legal representation to clients meeting VLA's income qualifications.

unfinished draft—whether rough or polished—of an artist's work could destroy his reputation and integrity.

The majority decision below, by condoning defendants' attempt to "scoop President Ford on his own memoirs," not only does damage to plaintiffs' copyright, but threatens both the economic rights and integrity of all authors. Should defendants be entitled to publish a stolen, unfinished draft of a Rauschenberg painting, on the grounds that doing so somehow reveals something "newsworthy?" Or an unfinished score by Stephen Sondheim? Or an unfinished play by Arthur Miller? Or the unpublished diary of a Justice of this Court?

If the majority opinion does not allow such chicanery in all cases, it at least opens the door to it. We respectfully suggest that door should be shut, by reversal of the decision below.

ARGUMENT

"Fair Use" of Unpublished Materials, If It Exists at All, Requires An Extraordinary Fact Situation Not Present Here

We suggest that the unpublished nature of President Ford's manuscript is the hinge on which this case should turn.[2] No court has found an unauthorized use of unpublished copyrighted materials to be a "fair use." The author's consent has always been required. The basis for the author's virtually absolute right of first publication goes back to the earliest days of copyright.

At common law, in England and the United States, the author owned an absolute right to the first

[2] It is ironic that the very President who signed the 1976 Copyright Act into law should be victimized by an erroneous interpretation of that law.

publication of his work. He could determine the conditions under which it was made public. If he wished, he need not make it public at all:

> Every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public or commit them only to the sight of his friends. In that state the manuscript is, in every sense, his peculiar property; and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property.

Millar v. *Taylor,* 4 Burr. 2303, 98 Eng. Rep. 201 (1769 K.B.). See also, *Donaldson* v. *Becket,* 4 Burr. 2408, 2 Bro. P.C. 129, 1 Eng. Rep. 837 (1774 H.L.); *Wheaton* v. *Peters,* 33 U.S. (8 Pet.) 591 (1834).

This absolute prohibition was not merely grounded in the author's economic property right to his work, important though that is. It was also grounded in a quasi-privacy right, to prevent an unlawful intrusion into the artist's innermost feelings, and the concomitant damage that would result to his reputation if his unfinished works, or works never intended for public consumption in any form, were made known without his consent.

This basis for the right of first publication was best expressed in a fascinating British case, *Prince Albert* v. *Strange,* High Court of Chancery, 2 DeG. & Sm. 652, 64 Eng. Rep. 293, 79 Rev. Rep. 307, *aff'd* 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849). Queen Victoria and Prince Albert had created etchings for their own and their friends' amusement. The defendant came into possession of copies which he knew were obtained without consent,

described them in a catalogue, and offered them for sale.

As a matter of copyright law, the court enjoined the defendant's actions, because the artists' economic interest and integrity would be jeopardized by unauthorized publication:

> It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial to him; nor would it be difficult to suggest other examples.

64 Eng. Rep. at 309.

And, the court concluded, the treatment of unpublished works therefore differed from published works. Published works could sometimes be used without the author's consent (as under the modern doctrine of fair use); unpublished works could not:

> A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analysed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

64 Eng. Rep. at 311.

American cases dealing with the unauthorized publication of unpublished materials—even by newspapers in the course of their news reporting—have followed this rule. *Press Pub. Co.* v. *Monroe,* 73 Fed. 196 (2d Cir.), *aff'd,* 164 U.S. 105 (1896); *Baker* v. *Libbie,* 210 Mass. 599, 97 N.E. 109 (1912); *Stanley* v. *Columbia Broadcasting Sys., Inc.,* 35 Cal.2d 653, 221 P.2d 73 (1950) ("The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right, and the common law right is perpetual, existing until lost or terminated by the voluntary act of the owner, . . . while a statutory copyright permits a 'fair use' of the copyrighted publication, without deeming it an infringement." 221 P.2d at 78, quoting from 18 C.J.S., Copyright and Literary Property, sec. 2, p.138 et seq.); *Fendler* v. *Morosco,* 253 N.Y. 281, 171 N.E. 56 (1930) ("We are not now considering whether the defendant Tully made a fair use of plaintiff's play. Since plaintiff had not published or produced her play, perhaps any use that others made of it might be unfair." 253 N.Y. at 291.)

The 1976 Copyright Act, of course, pre-empted state common law protection and extended Federal statutory protection to all unpublished works. 17 U.S.C. Secs. 301, 303. But no change was made in the preexisting law of fair use. While previous decisional law was codified in 17 U.S.C. Sec. 107, that codification was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." S. Rep. No. 94-473, 94th Cong., 1st Sess., 62 (1975); H. Rep. No. 94-1476, 94th Cong., 2d Sess., 66 (1976).[3]

[3] The Senate Report discussed fair use of unpublished materials only in the context of classroom teaching, and not for the commercial, profit-making purposes at issue here. Even for non-profit classroom purposes, only the most extraordinary circumstances would justify fair use of unpublished materials:

> The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's "right of first publication" would outweigh any needs of reproduction for classroom purposes

S. Rep. 94-1476, at 64.

Note also that Congress was especially solicitous of authors' rights in unpublished materials in other circumstances. Thus, the compulsory license for public broadcasters' uses of copyrighted nondramatic musical, and pictorial, graphic and sculptural works, extends only to *published* works. 17 U.S.C. Sec. 118(b).

The extraordinary circumstances which would justify a finding of fair use of unpublished materials—circumstances which evidently have never been found before—are certainly not present here. President Ford's manuscript was to be published in only a few weeks, and he was still making changes in it. There was no compelling need to reveal it before its publication—all of the "revelations" defendants found so "newsworthy" had in fact been revealed in public documents before. Defendants did not know those "revelations" had previously been made public because, in their rush to "scoop President Ford on his own memoirs," the research was slipshod. And, most telling, defendants knew that the galley proof they acquired was, to put it bluntly, stolen.

Fair use is an equitable doctrine. S. Rep. No. 94-473, at 62; H. Rep. No. 94-1476, at 65. It requires "good faith and fair dealing." *Time, Inc.* v. *Bernard Geis Associates*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968). Perhaps inevitably, those who would publish unpublished materials without authorization come to court with unclean hands because they have obtained the materials, directly or indirectly, by nothing more than

common theft: *See, e.g., Press Pub. Co.* v. *Monroe, supra*[4]; *Atlantic Monthly* v. *Post Pub. Co.*, 27 F.2d 556 (D.Mass 1928); *Prince Albert* v. *Strange, supra.* Defendants here should not benefit from their dealing in bad faith.

The Court of Appeals' holding is contrary to the Copyright Law and sound public policy. It should be reversed.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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[4] The court there noted with strong disapproval the type of defense interposed here—that a journalist's judgments as to what was newsworthy superseded all rights of others:

> The managing editor [of the defendant's newspaper] testified "Under some circumstances, I believe that I have the right, as an editor, to publish the manuscript of a person without that person's consent." This is a restatement of the proposition so frequently advanced, when newspapers happen to be defendants, that the person or property rights of individuals are entitled to receive no consideration at the hands of the public press whenever a violation of those rights may, in the opinion of the editor, promote the entertainment of the purchasers of his paper.

73 Fed. at 200.